IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 6, 2001 Session

CHARLES HOLCOMB v. SVERDRUP TECHNOLOGY, INC.

Appeal from the Circuit Court for Coffee County
No. 28,461 John W. Rollins, Judge

No. M2000-00536-COA-R3-CV - Filed November 8, 2001

This case involves an age discrimination claim under the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.* Plaintiff received oral and written notice of his termination on August 29, 1995, and a certified letter regarding benefits and confirming the termination on September 5, 1995. The termination was to be effective as of September 29, 1995. Two new employees were hired on October 1, 1995, and their hirings caused Plaintiff to believe he had been terminated because of his age. Plaintiff did not file suit until September 23, 1996, and the case was dismissed based on failure to file within the one year statute of limitations. We affirm on the ground that Plaintiff was given unequivocal notice on August 29 and, therefore, failed to meet the statute of limitations.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WALTER C. KURTZ, SP. J., joined.

James C. Thomas, Winchester, Tennessee, for the appellant, Charles Holcomb.

Karen L. C. Ellis, Michael S. Moschel, Nashville, Tennessee, for the appellee, Sverdrup Technology, Inc.

OPINION

This matter rests upon whether or not the employee filed his employment discrimination lawsuit within one-year of his obtaining unequivocal notice of his impending termination of employment and, secondarily, whether or not the statute of limitations was tolled until the employee discovered that the cause of his termination was, as he believes, age discrimination, rather than the reason given him by his former employer.

Appellant, Mr. Holcomb, was hired by Appellee, Sverdrup Technology, Inc., on September 16, 1983, as supervisor of plant operations. He was responsible for planning and scheduling various

tests of jet and rocket engines. On August 29, 1995, Mr. Holcomb was advised, and provided written notice, by his supervisors that his employment would be terminated on September 29, 1995, as a result of a reduction in work force. The letter stated in pertinent part, "Due to a change in the workload requirements, the manning required for the 'T' Contract workload has been reduced. We regret that this reduction affects your continued employment with Sverdrup Technology, Inc. AEDC Group. Therefore, it is necessary to terminate your employment on September 29, 1995."

Mr. Holcomb was told on August 31 by the executive in charge of the reduction that the termination decision was final and not to get false hopes. On September 5, 1995,[1] Mr. Holcomb was sent a letter by certified mail from Sverdrup's Retirement Benefit Office confirming his termination, the cessation of certain benefits and discussing options for his accumulated benefits.

After he was notified of his termination, Mr. Holcomb asked Mr. Burroughs to help save his job. At the time, Mr. Burroughs was on medical leave due to a heart attack. Mr. Burroughs offered to go to company management and tell them that he would take Mr. Holcomb's place by taking early retirement due to his health conditions. However, this offer was denied by management, and Mr. Burroughs relayed management's "no" decision to Mr. Holcomb. Additionally, Mr. Holcomb asked another supervisor for assistance in helping him see if there was anything that could be done to keep his job.

Mr. Holcomb completed the company's personnel clearance process on September 18, 1995, which included turning in company property and his keys. His employment ceased on September 29, 1995. Mr. Holcomb discovered that two new younger employees were hired on October 1, 1995, and he contends they were hired to perform his old job. Almost a year later, on September 23, 1996, Mr. Holcomb filed suit in Coffee County Circuit Court alleging discrimination under the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.*

Sverdrup filed for summary judgment based on a statute of limitations defense, and that motion was originally denied. However, on the day of trial, the court reconsidered its prior decision and granted the motion. After being denied a motion for new trial or to alter or amend the judgment, Mr. Holcomb appealed. He frames his appeal as two questions: (1) whether or not the statute of limitations bars his claim and (2) whether the statute of limitations was tolled during the period prior to his discovery of the "real reason" for the firing. For the reasons below, we find that the cause of action accrued and the statute of limitations began to run on August 29, 1995, and was not tolled.

[1]Mr. Holcomb's wife did not sign for the letter until September 7, 1995.

I.

A trial court's grant of a motion for summary judgment presents a question of law that we review *de novo* without a presumption of correctness. *Goodloe v. State*, 36 S.W.3d 62, 65 (Tenn. 2001); *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000). We must determine whether there is no genuine and material factual issue, and the movant is entitled to judgment as a matter of law. *Id.* In making this determination, we view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in its favor, affirming the summary judgment only when the facts and inferences permit a reasonable person to reach but one conclusion. *Id.*

II.

Mr. Holcomb, now in his 60's, believes he was discriminated against based on his age. He brought an employment discrimination action under the Tennessee Human Rights Act. Such actions are subject to the provisions of Tenn. Code Ann. § 4-21-311, "A civil cause of action under this section shall be filed in Chancery Court or Circuit Court within one (1) year after the alleged discriminatory practice ceases."

Tenn. Code Ann. § 4-21-311 became effective on May 22, 1992, and until *Weber v. Moses*, 938 S.W.2d 387 (Tenn. 1996), the Tennessee Supreme Court had not addressed this statute of limitations. The Court in *Weber* held that "a discriminatory practice ceases and is complete when the plaintiff is given unequivocal notice of the employer's termination decision, even if employment does not cease until a designated date in the future." 938 S.W.2d at 392. After being given notice of his termination in early August of 1992, the employee in *Weber* wrote a letter on August 5, 1992, requesting reconsideration of the decision which was denied by the employer.

However, the employee continued to hope that the stated termination date of August 31, 1992, would not be final. The Court held that "An employee's hope for rehire, transfer, promotion, or a continuing employment relationship cannot toll the statute of limitations absent some employer conduct likely to mislead an employee into sleeping on his rights." *Id.* at 393. Therefore, an action filed on August 31, 1993, was barred by the statute of limitations which began to run in early August of 1992 when the employee was originally given notice of his termination. *Id.*

The *Weber* Court relied heavily on two United States Supreme Court cases, *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) and *Chardon v. Fernandez*, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981). In *Ricks*, a faculty member alleged that he was denied tenure based on his national origin, and he was later terminated. The Court determined the statute of limitations began to run on the date of the denial of tenure, because at that time the employee had notice of all the alleged wrongful acts. 449 U.S. at 258, 101 S. Ct. at 504. The Court stressed that the termination was not an independent discriminatory act, but merely the "delayed, but inevitable, consequence of the denial of tenure." *Id.* 449 U.S. at 257-58, 101 S. Ct. at 504. The Court emphasized that the "proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." *Id.* 449 U.S. at 258, 101 S. Ct.

at 504. The "mere continuity of employment, without more is insufficient to prolong the life of a cause of action for employment discrimination." *Id*. 449 U.S. at 257, 101 S. Ct. at 504. Therefore, the employee's action was time barred. Similarly, in *Chardon* the Court reiterated its holding in *Ricks* "that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful." 454 U.S. at 8, 102 S. Ct. at 29.

Our Supreme Court in *Weber* similarly held that in terms of retaliatory discharge "[w]hile a prerequisite to the running of the statute of limitations is plaintiff's reasonable knowledge that an injury has been sustained, a plaintiff is not entitled to delay filing until all injurious effects or consequences of the actionable wrong are fully known." 938 S.W.2d at 393 (citing *Wyatt v. A-Best, Co., Inc.*, 910 S.W.2d 851, 855 (Tenn. 1995)). In other words, notice of the termination provides knowledge of the injury; the fact that employment may continue beyond the date of the notice does not mean that the employee gains reasonable knowledge of the adverse action only when employment actually ceases.

More recently, our Supreme Court in *Fahrner v. SW Mfg., Inc*., 48 S.W.3d 141 (Tenn. 2001), affirmed the holding of *Weber* and concluded that unequivocal notice was given to Mr. Fahrner when he was given his separation notice. *Fahrner* involved an employee who received notice in writing on November 21, 1997, that he was to be terminated. Mr. Fahrner's last date of employment was December 18, 1997. In pertinent part, the Court stated:

> We have already decided this issue. In *Weber* we held that employment discrimination and retaliatory discharge causes of action accrue and the statute of limitations begins to run when the employee is given **unequivocal notice** of the employer's termination decision.

Fahrner, 48 S.W.3d at 144 (citations omitted) (emphasis in original).

Herein, Mr. Holcomb argues that the statute of limitations should not run from August 29, when he was first given oral and written notice of his termination or even from September 7, when he received additional written notice regarding benefits. Mr. Holcomb states in his brief that when he was notified about termination, he "began an attempt to avoid said termination," which included contacting various supervisors to enlist their aid, and that as a result of these conversations "he had hopes of being retained." We see no real distinction between Mr. Holcomb's claims and those made by the plaintiff in *Weber*. The trial court herein made specific findings of facts as follows:

> There is no dispute that Plaintiff received a letter on August 29, 1995, explaining he was being laid off as part of a reduction in force by his employer, Sverdrup. Also, Tom Clark, Sverdrup's Facility Operations Director, and Tom Kidd, Plaintiff's Manager, met with and delivered the letter to Plaintiff on August 29, 1995. The letter stated that Plaintiff's employment would be terminated effective September 29, 1995, and he was, in fact, terminated on that date. . . . Plaintiff did not file suit until

> September 23, 1996, more than one year after Plaintiff received his RIF [reduction in force] letter on August 29, 1995.
>
> Plaintiff argues that summary judgment is inappropriate inasmuch as he had a continuing hope which he asserts as a reasonable belief that he would not be terminated on September 29. Plaintiff contends that Tom Kidd, his Manager, and Charles Burroughs, his Supervisor, both led him to believe that they would try and assist him. There is no evidence that Mr. Kidd had the authority or ability to rescind the termination notice. Mr. Burroughs' prior affidavit states that he told Plaintiff "he would see what he could do." Mr. Burroughs then made one phone call to the Defendant's Human Resource Director and offered to take an early medical retirement in order to save Mr. Holcomb's position. Mr. Burroughs' offer was rejected, and he was told that "Mr. Holcomb was being laid off even if [Burroughs] did get a medical retirement." Mr. Burroughs conveyed this information to Mr. Holcomb. At no time between August 29 and September 29 was Mr. Holcomb ever told by a management official with Sverdrup that he would not be laid off.
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> It is clear in this case that Mr. Holcomb was notified on August 29, 1995, that his employment was to be terminated on September 29, 1995, and that letter was never rescinded. However, he did not file his suit until September 23, 1996, more than one year after he had received the RIF letter on August 29, 1995.

These findings of fact accurately reflect the record before the court on the motion for summary judgment.[2] The facts are undisputed that Mr. Holcomb was given unequivocal notice of his impending termination on August 29, 1995. Thereafter, he asked, as did the employee in *Weber*, for reconsideration of that decision by asking his immediate supervisors to see if there was anything they could do to help him. We find nothing in the record that would constitute an affirmative act on behalf of the employer, or anyone capable of reversing or rescinding that termination decision, to cause Mr. Holcomb to sleep on his rights. Mr. Holcomb was notified both orally and by letter on August 29, 1995, and was aware of the decision to terminate his employment effective September 29, 1995, and, therefore, was aware of his injury for statute of limitations purposes. The fact that

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[2]This case differs factually from *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677 (Tenn. Ct. App. 1999) (*perm. app. denied* Oct. 4, 1999). Both cases involve questions of when the statute of limitations began to run and when unequivocal notice was given. The facts establishing that date were critical to the *Reed* decision wherein we stated:

> Contrary to the trial court's ruling, we conclude that Reed could not have received unequivocal notice of Alamo's termination decision on November 23, 1994, because on that date, no decision had been made to terminate Reed. The undisputed evidence showed that, after that date, Snyder rescheduled Reed's return to work and informed her that he would not make any termination decision or initiate any disciplinary action until after she returned to the doctor's office on December 7. The evidence showed that Snyder did not actually terminate Reed until December 13, 1994, and that Reed did not receive notice of her termination until sometime after that date.

4 S.W.3d at 682-83.

his last day of work was September 29 does not affect the running of the statute of limitations because the operative decision was made and notice given in advance of the termination date.

On appeal, Mr. Holcomb argues that summary judgment was not appropriate because there are material facts in dispute with regard to when he was given unequivocal notice. However, Mr. Holcomb has not disputed the dates and content of the written notices he received or the fact that he was told, on August 31, by the person who was responsible for the reduction in force that the decision to terminate his was final. He does not dispute that he turned in his keys and other company property as part of the company's outprocessing on September 18. His lawsuit was filed more than one year after each of these dates. Further, Mr. Holcomb has never alleged that anyone at the company ever told him he would not be terminated. Instead, he asserts that, based on his conversations with various supervisors wherein he asked for help in keeping his job, he felt there was a chance he would not be terminated. He has failed to establish that a dispute of fact exists as to the date upon which he was given unequivocal notice of termination. Thus, summary judgment was appropriate.

III.

Alternatively, Mr. Holcomb argues that the statute of limitations was tolled from the time notice was given of his termination until he discovered the "real reason" for his termination, the alleged age discrimination. Mr. Holcomb asserts that the statute was tolled because the reduction in work force rationale given for his termination was not and could not have been discovered to be false until the new younger employees began work on October 1, 1995. In other words, the statute of limitations should begin to run, he asserts, from the date he "discovered" the cause of his termination and, thereby, the basis for his action against his former employer.[3]

The Supreme Court considered a similar "discovery rule" argument in *Fahrner*. In that case, the employee was given notice of the termination of his employment because of a "reduction in work force due to decrease in sales." Several months later, his attorney interviewed a witness who stated that the employer had deliberately terminated employees for filing workers' compensation claims and had fired some non-injured employees in order to disguise its conduct. Mr. Fahrner argued that his cause of action accrued when his attorney first discovered the unlawful ground for his termination. In rejecting that argument, the Supreme Court stated:

> The rationale of *Weber* is simply that an employee "discovers" that an injury has been sustained for purposes of the statute of limitations when the employer provides unequivocal notice of the adverse employment action - in this case, termination. At this point, of course, the employee may not know the true reason for the employer's adverse employment decision, or other facts that would tend to show the employer has behaved unlawfully. "We have stressed, however, that there is no requirement that the plaintiff actually know the specific type of legal claim he or she has, or that

[3]Sverdrup denies that other persons were hired to do Mr. Holcomb's former job and denies any discrimination.

> the injury constituted a breach of the appropriate legal standard." [*Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 532-33 (Tenn. 1998)] (citing *Shadrick v. Coker*, 963 S.W.2d 726, 733 (Tenn. 1998)). Rather, the employee, through his lawyer, must investigate the circumstances surrounding the employer's decision, and he has the time given to him by the legislature to complete this investigation and then file a complaint - in this case, one year. As another court has put it, "when an employee knows that he has been hurt and also knows that his employer has inflicted the injury, it is fair to begin the countdown toward repose." *Morris v. Gov. Dev. Bank of Puerto Rico*, 27 F.3d 746, 750 (1st Cir. 1994).

48 S.W.3d at 144-45.

We see no basis for distinguishing Mr. Holcomb's argument herein from that rejected in *Fahrner*. In addition, to the extent Mr. Holcomb's "discovery rule" argument can be interpreted as including an argument that the cause of his termination was fraudulently concealed from him or that Sverdrup's conduct should toll the statute of limitations under the theory of equitable estoppel, the *Fahrner* decision also resolves those issues adversely to Mr. Holcomb.

The two theories are different. Although both are applied to relieve a plaintiff from the consequences of failing to bring an action within the applicable statute of limitations because the defendant misled the plaintiff, they are based on different reasons for the failure: "a plaintiff invoking the discovery rule [and fraudulent concealment] asks the court to properly apply the statute of limitations; a plaintiff invoking equitable estoppel, in effect, asks the court to waive it." *Fahrner*, 48 S.W.3d at 146. A plaintiff's fraudulent act which prevents the plaintiff from knowing he has been injured until after the statute of limitations has run may justify a determination that the statute of limitations did not being to run until the plaintiff, exercising reasonable diligence, discovers the fraud which the defendant wrongfully concealed. *Id.* at 145-146. Thus, fraudulent concealment may be a consideration in application of the discovery rule to a particular fact situation and involves concealment of the injury.

On the other hand, equitable estoppel is applied where a plaintiff has discovered his injury, or should have discovered it, causing the statute of limitations period to begin. Where the plaintiff nonetheless fails to bring an action within the limitations period because the defendant, by representations made and affirmative steps taken, prevents the plaintiff from filing a known cause of action in a timely manner, equitable estoppel may be applied to toll the statute of limitations. *Id.* at 146. One common example of the type of conduct by a defendant which justifies the use of equitable estoppel to toll the statute of limitations is where plaintiff is led to believe that a statute of limitations defense will not be asserted. In other words, estoppel applies to misrepresentation dealing with the actual filing of a lawsuit whereas fraudulent concealment deals with discovery of an injury.

In *Fahrner*, the plaintiff argued that the unlawful discrimination was discovered several months after he was terminated, when his attorney interviewed some other employees and, therefore,

that the statute of limitations should begin to run from the date of discovery that the termination was the result of retaliation and discrimination. The Court rejected this argument and held that because the injury is known at the time of unequivocal notice, "the defendant's misconduct did not prevent the plaintiff from learning he was injured; it allegedly prevented him from filing suit in time." *Id.* at 146. The Court also considered Mr. Farhner's claim under an equitable estoppel analysis and held that "Fahrner's assertion that the separation notice is misleading because it failed to cite an illegal basis for his termination is not sufficient to invoke the doctrine of equitable estoppel." *Id*. at 147. The court explained:

> The problem with Fahrner's argument is that is simply restates the central issue of his underlying claims. Fahrner cannot argue that the statute of limitations should be tolled because his version of the events is correct and SW Manufacturing's version is a lie. Were we to accept this argument, we would, in effect, be holding that he should win on the merits of his retaliatory discharge and discrimination claims. As one court put it, in the age discrimination context, "This [argument] merges the substantive wrong with the tolling doctrine. . . . It implies that a defendant is guilty of [concealment or other misconduct justifying equitable estoppel] unless it tells the plaintiff, 'We're firing you because of your age.' It would eliminate the statute of limitations in age discrimination cases."

Id. at 147 (citations omitted).

In this case, Mr. Holcomb was given oral notice of his impending termination and a letter on August 29, 1995, which stated that "due to a change in the workload requirements . . . it is necessary to terminate your employment on September 29, 1995." Because this letter supplied the requisite knowledge of injury, fraudulent concealment does not apply.

Mr. Holcomb has not presented any evidence that Sverdrup took any affirmative steps to prevent him from timely filing his lawsuit. The only misrepresentation Mr. Holcomb alludes to is the reason given in the notice of termination, which he alleges was a false reason. As the Supreme Court found in *Farhner*, such an assertion that the separation notice is misleading because it failed to cite an illegal basis for termination is not sufficient to invoke the doctrine of equitable estoppel. *Id.* at 147. We note that Mr. Holcomb asserts that he discovered the hiring of new employees on or shortly after October 1, 1995; he did not file his lawsuit until September 23, 1996. He has alleged no action by Sverdrup to deter or prevent his filing during that time. Thus, Mr. Holcomb has failed to allege any facts which might entitle him to a tolling of the statute of limitations on the basis of equitable estoppel.

IV.

For the reasons discussed herein, we find that Mr. Holcomb was given unequivocal notice of the termination of his employment on August 29, 1995, and, therefore, his lawsuit filed on September 23, 1996, was barred by the statute of limitations. Furthermore, neither the discovery rule

nor equitable estoppel applies to relieve Mr. Holcomb from the consequences of that determination. Accordingly, the decision of the trial court granting Sverdrup's motion for summary judgment is affirmed. This cause is remanded to the trial court for any further proceedings which may be necessary. Costs of this appeal are taxed to the Appellant, Mr. Holcomb, for which execution may issue, if necessary.

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PATRICIA J. COTTRELL, JUDGE